Nos. 80-1012, 80-1020, 80-1052

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IN THE SUPREME COURT
OF THE
UNITED STATES
October Term, 1981

BAXTER RICE, Director, Department of Alcoholic Beverage Control of the State of California,

Petitioner,

v.

NORMAN WILLIAMS COMPANY, et al.,

Respondents,

BOHEMIAN DISTRIBUTING COMPANY,

Petitioner,

v.

NORMAN WILLIAMS COMPANY, et al.,

Respondents,

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation,

Petitioner,

v.

NORMAN WILLIAMS COMPANY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

BRIEF AMICUS CURIAE OF CONSUMERS UNION OF UNITED STATES, INC. IN SUPPORT OF RESPONDENTS

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BRIEF AMICUS CURIAE OF CONSUMERS UNION OF UNITED STATES, INC. IN SUPPORT OF RESPONDENTS

Consumers Union of United States, Inc. ("Consumers Union") submits this brief as amicus curiae in support of Respondents[1]/ with the written consent of all parties, pursuant to Rule 36.2 of this Court.

INTEREST OF AMICUS CURIAE

Consumers Union is a nonprofit, membership organization chartered in 1936 to provide information, education and counsel about consumer goods and services and the management of family income. Consumers Union publishes Consumer Reports, a monthly magazine with a circulation of over 2.9 million, which regularly carries articles rating products that Consumers Union has tested,

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1/ Unless otherwise indicated, references in this brief to "Respondents" are to non-franchised wholesalers, although some liquor retailers are Respondents in this case.

as well as articles on consumer services, marketplace economics and judicial actions that affect consumer welfare. Approximately 300,000 residents of California subscribe to Consumer Reports.

Consumers Union in no way supports increased alcohol consumption, but has long opposed laws which restrict competition in consumer goods. Since early 1977, the West Coast Regional Office of Consumers Union has been an active participant in California in both litigation and legislative debate concerning the pricing and distribution of alcoholic beverages. Attorneys representing Consumers Union sought and were granted leave to appear as amicus curiae in Rice v. Alcoholic Beverage Control Appeals Board, 21 Cal.3d 431, 579 P.2d 476, 146 Cal.Rptr. 585 (1978) and California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

Consumers Union strongly opposed amending Business and Professions Code § 23672 (the "designation statute"), which is at issue here, when the California Legislature considered the amendment in 1979. We argued then and maintain now that the designation statute is unsound as a matter of public policy and will not encourage temperance or further any other state interest. We agree with Respondents that the measure is also inconsistent with and preempted by the federal antitrust laws, violative of the due process and equal protection clauses of both the United States and California Constitutions, and is an unlawful delegation of legislative power. In addition, the designation statute will impose a substantial cost on California consumers in the form of higher prices for distilled spirits.

STATEMENT

The court below found the designation statute invalid because it conflicts with and is preempted by the Sherman Act. The portion of the statute which the court found invalid provides:

> A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent. Business and Professions Code § 23672 (West's Supp., 1981).

SUMMARY OF ARGUMENT

The designation statute would eliminate competition at the wholesale level by prohibiting Respondents from importing nationally advertised brands of distilled spirits, which account for 90% of the distilled spirits consumed in California. Eliminating this competition

will cause a substantial increase in the amount of money California consumers spend on distilled spirits, but will have no dampening effect on consumption.

The anti-competitive effects of the designation statute clearly conflict with the federal antitrust laws. Since, as the court below found, the designation statute serves no state interest, it cannot be immune from federal antitrust laws under the "state action" doctrine of Parker v. Brown, 317 U.S. 341 (1943), and its progeny. When California's interest in the designation statute (which was enacted under the grant of power contained in the Twenty-First Amendment), is weighed against the federal interest in the Sherman Act (which is coextensive with Congress' broad power to regulate commerce), the balance tips in

favor of the federal antitrust laws, thus preempting the designation statute.

The designation statute is also invalid on a number of state grounds which the court below did not explicitly rely on.

ARGUMENT

Petitioner Wine & Spirits Wholesalers of California ("WSWC") has described the situation resulting from the decision of the court below as follows:

> 1) the number of potential sources of supply for a particular brand has increased due to the addition of Oklahoma wholesalers and potential suppliers from other states,
>
> 2) any and all California importers may acquire any brand of distilled spirits, and
>
> 3) the location and identity of the importers of a particular brand are subject to monetary (sic) change. Brief of Petitioner WSWC at 36.

Consumers Union finds this a particularly apt description of a competitive market which has led to substantial benefits for consumers. Competition within the distilled spirits market in California at the wholesale level is at stake in this case. Because the designation statute has been held invalid, Respondents are able to import distilled spirits and sell them to retailers for less than the brand owners' suggested prices, which the franchised wholesalers adhere to. Norman Williams v. Rice, 108 Cal.App.3d 348, 353; 166 Cal.Rptr. 563, 567 (1980). The designation statute would prohibit Respondents from importing distilled spirits, thus eliminating the only meaningful form of competition at the wholesale level. Eliminating wholesale competition will certainly cause retail prices to rise, but will have no effect on the

amount of alcohol consumed, as both this Court and the California Supreme Court have recognized. Midcal, 445 U.S. at 113; Rice v. Alcoholic Beverage Control Appeals Board, 21 Cal.3d 431, 146 Cal.Rptr. 585, 603 (1978).

The savings for consumers at stake in this case are staggering. In 1978, Californians consumed 20,936,126 cases of distilled spirits. J.A. 32. According to the prices posted with the California Department of Alocholic Beverage Control by Berberian Bros., Inc., a designated wholesaler, and Norman Williams Co., one of the Respondents, the designated wholesaler was charging retailers nearly $16.00 more per case for Johnnie Walker Red Label Scotch Whiskey and nearly $20.00 more per case for Johnnie Walker Black

Label Whiskey, in October, 1979.2/ These figures indicate potential savings to California consumers of approximately $1.25 to $1.50 per bottle. Some reports have placed the per bottle savings to

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2/ On its November 15, 1979 Distilled Spirits Price Posting Schedule, Berberian Bros., Inc. ("Berberian") lists its price to retailers for a case of one-quart bottles of Johnnie Walker Red Label Scotch Whiskey ("Johnnie Walker Red") as $112.72. Berberian's price to retailers for a case of one-quart bottles of Johnnie Walker Black Label Scotch Whiskey, 12 year ("Johnnie Walker Black") was $152.88. Exhibit C to Petitioners Replication and Memorandum in Support Thereof, dated February 5, 1980. Respondent Norman Williams Co.'s Price Posting Schedule of the same date, shows its price to retailers for a case of one-quart bottles of Johnnie Walker Red was $96.93, which is $15.79 less than Berberian's price at the time. Norman Williams Co.'s price to retailers for a case of one-quart bottles of Johnnie Walker Black was $133.25, which is $19.63 less than Berberian's price at that time. Exhibit G to Amended Petition for Writ of Mandate and/or in the Alternative, Prohibition and/or Certiorari, dated November 15, 1979.

consumers from the activities of Respondents as high as $2.50 per bottle[3]/ However, even assuming the savings is only $0.25 per bottle, price competition could save California consumers $62,808,378 each year.[4]/ These savings are what the California courts, legislature and consumers had in mind when fair trade was eliminated. The designation statute is an attempt to revive fair trade, with its security for franchised wholesalers, lack of competition, and high prices for the liquor industry. The court below rejected this attempt to bring fair trade in through the back door as incon-

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3/ "Jack Daniels, meet Adam Smith," FORBES, November 23, 1981, p. 164.

4/ Savings computed using a figure of 12 bottles per case, which is how quarts, liters, fifths and 750 ml. bottles are packaged.

sistent with and preempted by the Sherman Act. This Court should affirm the decision below.

I.

THE DESIGNATION STATUTE IS ANTI-COMPETITIVE IN EFFECT AND IS PREEMPTED BY THE SHERMAN ACT

A. The Designation Statute Attempts To Authorize Practices Which Violate The Sherman Act

Consumers Union does not question California's power to regulate liquor importers; California has a licensing procedure which fills this function and all of Respondents are licensed. (Joint Appendix ("J.A.") 15). The designation statute goes beyond licensing, however, by allowing the distillers to make the final decision on who will be allowed to import distilled spirits into California and who will not. This allows the brand owners to eliminate competition at the wholesale

level in violation of section 1 of the Sherman Act. As the court below found, the designation statute "gives private parties the unfettered power to forbid interstate trade between other privates(sic) parties. Such a grant of authority is in direct contravention of the express terms of the Commerce Clause and the Sherman Act." Norman Williams, 108 Cal. App.3d at 358, 166 Cal. Rptr. at 570.

The Sherman Act prohibits anti-competitive practices by private parties such as group boycotts or price fixing. Fashion Originators Guild of America, Inc. v. F.T.C., 321 U.S. 457 (1941), United States v. Parke, Davis and Co., 362 U.S. 29 (1960). The Sherman Act seeks to eliminate these kinds of abuses in free markets by making such practices violations of federal law. In some instances states

have sought to authorize private parties to engage in such practices, but this Court has struck down those attempts as inconsistent with the Sherman Act. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951). In this case there is an even clearer affront to Sherman Act principles because the designation statute does not simply authorize violations of the Sherman Act by brand owners. The designation statute actually creates the singular circumstances under which the violation can take place. Without the designation statute, a brand owner might lawfully prevent wholesalers with whom he does business from selling to other wholesalers, Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), but he could never prevent a wholesaler from purchasing the brand

owner's distilled spirits.5/ The designation statute explicitly prohibits undesignated importers--although fully licensed by the state--from purchasing distilled spirits and importing them into California. This is a restraint on competition which no brand owner could accomplish through vertical restraints. In fact, short of physical restraint or intimidation, it is difficult to conceive of a way in which the distillers could prevent Respondents from importing distilled spirits which they have lawfully purchased. That the designation statute gives the distillers this power only underscores the tremendous privilege conferred

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5/ In Oklahoma, the brand owner cannot even restrict the wholesalers he sells to. The brand owner must sell to all wholesalers who wish to buy his brand, Okla. Stat. Tit. 37, § 533 and the wholesalers are free to sell to all "qualified persons." Okla. Stat. Tit. 37, § 521(e).

upon the distillers by the designation statute.

B. The Violation Of The Sherman Act Which The Designation Statute Authorizes Is A Per Se Violation

The court below noted that the violation of the Sherman Act which the designation statute authorizes is difficult to analyze in terms of the usual "per se" and "rule of reason" categories, but concluded that "A more clear power to restrain interstate trade is difficult to imagine." Norman Williams, 108 Cal.App.3d at 356, 166 Cal.Rptr. at 569. Per se violations of the Sherman Act are those occasioned by "practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate

inquiry as to the precise harm they have caused or the business excuse for their use." Sylvania, 433 U.S. at 50, quoting Northern Pac. R. Co. v. United States, 366 U.S. 1, 5 (1958). In deciding whether a particular practice is a per se violation of the Sherman Act, "The probability that anti-competitive consequences will result from a practice and the severity of those consequences must be balanced against its pro-competitive consequences." Sylvania, 433 U.S. at 50, fn.16.

1. The Anti-Competitive Consequences of the Designation Statute Are Certain and Severe

Here, the anti-competitive consequences are not merely probable, they are certain. Respondents have been denied designation by the brand owners, Norman Williams, 108 Cal.App.3d at 354, 166 Cal.Rptr. at 568, and

will therefore be excluded from the import market. The severity of the anti-competitive consequences is clear. 90% of the distilled spirits consumed in California are imported (J.A. 14), so the designation statute would eliminate the only meaningful competition at the wholesale level for virtually all distilled spirits.

2. The Designation Statute Has No Pro-Competitive Consequences

Before determining that the designation statute occasions a per se violation of the Sherman Act, the anti-competitive consequences must be balanced against the pro-competitive consequences. Sylvania, 433 U.S. at 50, fn.16. That is an easy task, because the designation statute will have no pro-competitive consequences. Although various petitioners and amici

have argued that the designation statute would allow franchised wholesalers to better serve their retailers, these arguments reflect nothing more than a desire to recover and retain the privileged position they held under fair trade laws, free from the pressures of competition. Wine and Spirits Wholesalers of America, Inc. and National Beer Wholesalers Association of America, Inc., ("WSWA and NBWA") in their amici curiae brief argue that the designation statute will protect authorized wholesalers from harm by other wholesalers who sell only to high volume retailers, thus "cream skinning" the most profitable accounts off the market. Brief of Amici Curiae WSWA and NBWA at 7-8.

But this type of activity can take place in any industry and is an accepted

part of competitive life. Petitioners are seeking to use the designation statute to shield them from the realities of competition. If it were true that the designation statute "merely recognizes" the distillers' "inherent power to designate importers to whom they will sell," as petitioners claim, Norman Williams, 108 Cal.App.3d at 357, 166 Cal.Rptr at 569, it would serve no purpose. What the designation statute actually does is grant the distillers a power they cannot exercise under the Sherman Act.

3. The Designation Statute Has the Effect of a Group Boycott

By giving the distillers the power to prevent Respondents from purchasing distilled spirits, California is sanctioning and enforcing an action which has the same effect as if all the distillers had

agreed with all of their franchised wholesalers not to sell to Respondents. This group boycott would deny Respondents access to 90% of the California distilled spirits market and would be a per se violation of the Sherman Act. Fashion Originators Guild of America, Inc. v. F.T.C., 312 U.S. 457 (1941). The distillers could avoid this result only by designating all licensed wholesalers. The designation statute obviously does not contemplate this possibility, since the statute would have no meaning if all licensed wholesalers were designated by the distillers.

The designation statute therefore authorizes a per se violation of the Sherman Act, as described by this court in Sylvania, Northern Pac. R. Co. v. United States, and Fashion Originators Guild.

C. Distillers And Franchised Wholesalers Are Adequately Protected By Other California Statutory Provisions

Even without the designation statute, Petitioners will be insulated from certain forms of competition. For example, "loss leaders" and premiums or gifts are already prohibited under California law.6/ If Respondents were to compete unfairly, Petitioners could seek redress under existing state law. Unfair Practices Act,

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6/ Business and Professions Code § 17044 prohibits using a "loss leader," defined in Business and Professions Code § 17030 as "any article or product sold at less than cost" where the intent is to encourage sales of other merchandise, mislead purchasers or injure competitors. "Cost" is defined in Business and Professions Code § 17026 as "invoice or replacement cost, whichever is lower ... plus the cost of doing business ... and in the absence of proof of cost of doing business a markup of 6 percent on such invoice or replacement cost." Gifts and sales under cost, with the intent of injuring competitors or destroying competition are prohibited by Business and Professions Code § 17043.

Business and Professions Code §§ 17000 et seq. Petitioners have shown nothing so unique, fragile, or even necessary about the liquor industry that requires it to be further insulated from competition by prohibiting would-be competitors from entering the market. Unlike the effect of Oklahoma's "open wholesaling" statute,7/ the lack of a designation statute will not force the brand owners to sell to wholesalers with whom they do not want to do business. Invalidating the statute will simply allow Respondents to continue to buy distilled spirits out of state, and sell them in California at prices below those charged by the authorized wholesalers, who adhere to the brand owners' "suggested" prices. J.A. 14 .

7/ Okla. Stat. Tit. 37, § 533.

D. The Sherman Act Should Be Used To Preserve The Competition Which Respondents Have Brought To The Market

It is remarkable that Petitioner Bohemian Distributing Company should attack the decision below on the ground that "federal antitrust law protects the process of competition, not the welfare of particular competitors," (Brief of Petitioner Bohemian Distributing Company, at 10) for protection of franchised wholesalers such as Bohemian is precisely what the designation statute seeks to accomplish. The designation statute was enacted to prevent competition by cutting off Respondents' source of supply for name brand liquor, thus forcing them out of business. If this Court reverses the decision below, it is the welfare of the large franchised wholesalers that will be protected, not the "process of competition."

Contrary to Petitioner Bohemian's contention, the federal antitrust laws seek to preserve the competition which Respondents have brought into the wholesale market, not to protect franchised wholesalers in their insulated positions.

II.

THE DESIGNATION STATUTE DOES NOT FURTHER ANY STATE INTEREST OF CALIFORNIA

A. The California Court's Findings Should Be Accorded Great Weight

The court below found no state interest is served by the designation statute. Norman Williams, 108 Cal.App.3d at 361, 166 Cal.Rptr. at 572. When the same court found no state interest was furthered by the price fixing statute in Midcal, this Court gave "great weight" to its views. Midcal, 445 U.S. at 111. The same result should obtain in this case.

It is interesting to note in this regard that Petitioner Rice, Director of the California Department of Alcoholic Beverage Control, does not appear from the legislative history to have even supported the legislation amending the designation statute. J.A. 56-73. Rice's comments in a recent magazine interview throw further doubt on the possibility that California believes the designation statute furthers any state interest. "Jack Daniels, Meet Adam Smith," FORBES, November 23, 1981.8/

8/ "What's shaping up in the liquor business today is a classic case of survival of the fittest--similar to developments in the airline, trucking and savings and loan industries. "Those that can adapt, will, those that can't, perish' says Rice ... 'that's the way the free enterprise system is supposed to work.'" "Jack Daniels Meet Adam Smith," FORBES, Nov. 23, 1981, p. 163.

B. The Designation Statute Will Not Aid California In Taxing Or Tracing Distilled Spirits

Petitioner WSWC claims the designation statute will aid California in taxing and tracing distilled spirits. The court below was corrected in rejecting this claim, Norman Williams, 108 Cal.App.3d at 361, 166 Cal.Rptr. at 572. There is nothing in the designation statute's legislative history to suggest that the California Legislature even considered administrative interests. J.A. 57-73. The only substantive justification Petitioners have averred for their administrative claim is that without the designation statute, the number of competitiors will increase and overseeing liquor will become "administratively more burdensome" for California. Brief of Amici Curiae, WSWA and NBWA at 31.

Absent some showing that California would "lose control" over distilled spirits wholesaling due to the increased administrative burden, administrative ease cannot be a legitimate state interest. In fact, California has been operating with an increased number of competitors for over 3 years, and there is no evidence that California's control over and review of liquor importation and taxation has been threatened in any way. Petitioners have not cited, nor do we know of, any enforcement actions made necessary by the increased number of competitors. Under Business and Professions Code § 23366.3, the Oklahoma wholesalers cannot ship distilled spirits into California until they agree to make their records available to California officials. The designation statute will not help California

officials in attempting to trace or tax distilled spirits shipments.

C. The Designation Statute Will Not Aid In Temperance

Petitioners have also advanced temperance as a justification for the designation statute, Norman Williams, 108 Cal.App.3d at 360, 166 Cal.Rptr. at 572. But they have completely failed to explain how the designation statute would further this goal. All the designation statute does is eliminate competition at the wholesale level. This will raise prices, but as the California Supreme Court found in Rice, higher liquor prices do not decrease consumption, Rice, 21 Cal.3d at 457, 146 Cal.Rptr. at 603. In Midcal, this court agreed. Midcal, 445 U.S. at 112-13.

D. The Designation Statute Will Not Protect Small Retailers

A final state interest which has been asserted is that of protecting small retailers. As noted above, the only certain effect of the designation statute is that it will raise prices by eliminating competition at the wholesale level. But as the California Supreme Court found in Rice, higher liquor prices do not protect small retailers. Rice, 21 Cal.3d at 456-7, 146 Cal.Rptr. at 602. See also Midcal, 445 U.S. at 113.9/ Small retailers are not hurt by the competition at the wholesale level, as can be seen from the fact that Respondent

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9/ Studies cited in Rice showed that retailers failed in fair trade states more frequently than in states without "fair trade" laws, even though the states without "fair trade" laws had lower prices. Rice, 21 Cal.3d. at 456, fn.21, 146 Cal.Rptr. at 602, fn.21.

wholesalers sell to small retailers (J.A. 15), and some of the Respondents in this case are small retailers who favor retaining the current competitive wholesale market in California. (J.A. 15).

III.

THE DESIGNATION STATUTE DOES NOT COME WITHIN THE STATE ACTION DOCTRINE

As this Court recognized in Midcal, the "state action" doctrine is designed to preserve our federal system by not allowing the Sherman Act to override state regulatory programs. Midcal, 445 U.S. at 103-4. In order for the "state action" exemption to apply, however, the anti-competitive practice at issue must be "clearly articulated and affirmatively expressed as state policy" and "'actively supervised' by the State itself." Midcal, 445 U.S. at 105

A. The Designation Statute Is Not Clearly Expressed As State Policy

In this case neither requirement of Midcal is fulfilled. The designation statute does not embody any clear state policy, because no state interest is furthered by the designation statute.10/ In fact, as the court below noted, the designation statute is directly opposed to the policy of competition expressed in the rest of California's laws governing distilled spirits. Norman Williams, 108 Cal.App.3d at 360 fn.3, 166 Cal.Rptr. at 572 fn.3.

10/ Supra at 24-30.

1. California's Distribution System Seeks to Encourage Competition; the Designation Statute Seeks to Prevent Competition

California's distribution system for distilled spirits has been characterized by Petitioners as "three-tiered." That is, there are distillers, wholesalers and retailers, with each level operated independently of the others. This description is not completely accurate, however. California also has rectifiers, businesses which purchase distilled spirits outside of California, bring the alcohol into California, add water to bring the liquid to the desired proof and then sell the final product to California wholesalers.11/ These products are some of the so-called "house

11/ Distilled spirits rectifiers are licensed under Business and Professions Code § 23368.1. A distilled spirits rectifier may also hold a distilled spirits wholesaler's license. Business and Professions Code § 23368.1 (West's Supp., 1981).

brands" which account for 10% of the distilled spirits consumed in California. (J.A. 17).

The point of California's three-tier system is not, as Petitioners would have this Court believe, that it is somehow magically related to the state's interest in liquor control. Rather, the three-tier system is a way to preserve competition by ensuring that the chain of distribution for distilled spirits does not become integrated and controlled by the brand owners. The pro-competitive policy behind preventing integration is evident. This is the opposite of the policy behind the designation statute, which seeks to eliminate competition at the wholesale level. Currently, twelve franchised wholesalers handle approximately 70% of the wholesale volume in imported distilled

spirits in California. J.A. 14. If this Court affirms the decision below, Respondents and others like them will be able to remain vigorous competitors with the franchised wholesalers, thus making the wholesale market competitive.

2. The Designation Statute Does Not Protect California's Distribution System Because That System Is Not Threatened by Respondents' Activities

Even if the three-tier system is considered an end in itself, the designation statute does not clearly express state policy because the three-tier sytem is not threatened by the "Oklahoma connection." All out of state shippers of distilled spirits (including the Oklahoma wholesalers who ship to Respondents) must obtain an "out-of-state distilled spirits shipper's certificate" from the Department of Alcoholic Beverage Control before the

distilled spirits can be shipped into California. Business & Professions Code § 23366.2 (West's Supp., 1981). In order to receive the certificate, the shipper must agree to comply with all California laws and regulations regarding distilled spirits and to make its books and records available to California officials for inspection. Business & Professions Code § 23366.3(a)(1) & (2). The shipper's certificate can also be revoked or suspended in the same manner as liquor licenses. Business and Professions Code § 23366.3(b). Thus, California law has already effectively absorbed the Oklahoma wholesalers into the three-tier system.

B. California Does Not Take An Active Role Under The Designation Statute

Not only is the designation statute not expressed as state policy, California also takes no part in making the decisions mandated by the statute. The brand owners make the only decisions under the designation statute, with no guidance or review by the state. In fact, what this Court said about the price setting program in Midcal is perfectly applicable here:

> The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program. Midcal, 445 U.S. at 105-6.

Here the state neither decides which wholesalers are to be authorized, nor reviews the reasonableness of the brand owner's decisions; nor does it regulate

the terms of the designation contracts. The state does not monitor market conditions or engage in any "pointed reexamination" of the program. The designation statute therefore does not provide for any "active supervision" by the state, as required by this Court in Midcal.[12/] Active supervision by the state is necessary before the program can be found immune from federal antitrust laws.

12/ Even the instructions put out by the California Department of Alcoholic Beverage Control for use by out of state distilled spirits shippers do not indicate that California will take an active part in supervising the designation of authorized wholesalers. WSWC Petition for Certiorari, Appendix F, at 26.

IV.

THE TWENTY-FIRST AMENDMENT DOES NOT CONFER UNLIMITED POWER UPON THE STATES TO ENACT LEGISLATION WHICH CONFLICTS WITH THE SHERMAN ACT

A. The Twenty-First Amendment Did Not "Repeal" The Commerce Clause; The Two Must Be Balanced

Section 2 of the Twenty-First Amendment provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

As this Court recognized in Midcal, these broad state powers can conflict with Congress' power to regulate interstate commerce. How the conflict is resolved turns upon the circumstances of each particular case. Midcal, 445 U.S. at 110.

Petitioners would have this Court resolve the conflict by simply having the Twenty-First Amendment overrule the Commerce

Commerce Clause in the area of liquor regulation. This Court has refused to take such a simplistic course in the past. In Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964), this Court reviewed prior decisions allowing the states great leeway in liquor regulation and stated:

> To draw a conclusion from this line of decisions that the Twenty-First Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. Idlewild, 377 U.S. at 331-2.

Instead, this Court concluded the Twenty-First Amendment and the Commerce Clause "each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." Idlewild, 377 U.S. at 332. In Idlewild, the only state interest

the Court could find was in preventing diversion of alcohol from Idlewild's duty free international business to domestic commerce. Idlewild, 377 U.S. at 333. But New York was admittedly not seeking to do this so the Court held New York's law prohibiting Idlewild's type of business invalid under the Commerce Clause. Idlewild, 377 U.S. at 334.

B. The State's Interest Must Be Weighed As A Matter Of Federal Law

Although more complex than the analysis urged by Petitioners, finding and weighing the state's interests allows the court to strike the correct balance between the Twenty-First Amendment and the Commerce Clause for each case. In Midcal, this court explicitly recognized that the balance struck can differ

depending on the state interests involved. The court stated:

> The Twenty-First Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. Midcal, 445 U.S. at 110.

This passage establishes a clear dichotomy, one which the court below followed explicitly. Norman Williams, 108 Cal.App.3d at 359, 166 Cal.Rptr. at 571. A state has a clear and important interest in deciding whether to permit the importation or sale of liquor. The state has a similarly clear interest in deciding how to structure the liquor distribution system. In these areas, then, the states have a great amount of control, free from the Commerce

Clause. It is the states' interests that give them this freedom, however, not the fact that a statute can be characterized as concerning "importation" or "distribution." A state does not have the same freedom when enacting statutes which involve less important state interests.

The Twenty-First Amendment is essentially a grant of power to the states of an authority they had given up under the Commerce Clause. In balancing the two provisions, we should not "lose sight of the explicit grant of authority." Midcal, 445 U.S. at 107. The need to balance the Twenty-First Amendment and the Commerce Clause is well understood by the California courts. In Rice, the California Supreme Court recognized:

> When a statute enacted pursuant to the Twenty-First Amendment conflicts with an enactment based on the commerce clause,

> we must balance the policies furthered by each in order to determine which should prevail. Rice, 21 Cal.3d. at 443, 146 Cal. Rptr. at 596.

The California Appellate Court which considered Midcal followed Rice exactly on this point. That court is the same California Appellate court which invalidated the designation statute in this case. When this Court reviewed Midcal, it approved the balancing done in that case and, by implication, Rice. Midcal, 445 U.S. at 111-13. The same balancing was done by the court below in this case and should be affirmed.

C. State And Federal Interests Must Be Balanced As A Matter Of State Law

Balancing the state and federal interests is mandated not only by this Court's decision in Midcal, but also by the California Constitution. Article XX,

§ 22 of the California Constitution grants the State of California "subject to the laws of the United States regulating commerce between foreign nations and among the states....the exclusive right and power to regulate the importation into and exportation from the State, of intoxicating liquor." Cal. Const. Art. XX, § 22 (West's Supp. 1981). The California Constitution explicitly recognizes the supremacy of federal regulation even in areas covered by the Twenty-First Amendment. Therefore, as a matter of state law, the state and federal interests must be balanced, as the court below did.

As the court below found, no legitimate state interest is furthered by the designation statute. This conclusion was arrived at by the same California

Appellate Court whose decision was approved in Midcal and is entitled to great weight. Midcal, 445 U.S. at 111-12. The designation statute has the same effect as a group boycott, a per se violation of the Sherman Act. Indeed, the anti-competitive effects of the designation statute are even greater than those of a group boycott. Under these circumstances, as in Midcal, the federal interests clearly predominate, and the designation statute is therefore preempted by the Sherman Act.

V.

THE DESIGNATION STATUTE IS INVALID ON STATE GROUNDS

In the court below, Respondents raised a number of state grounds on which the designation statute could be found invalid. The court below found the designation statute invalid because it

conflicts with and is preempted by the Sherman Act and declined to consider Respondents' contentions based on state grounds. Norman Williams, 108 Cal.App.3d at 362, 166 Cal.Rptr. at 573.

One of these state grounds is that the designation statute is an unlawful delegation of state power. Article XX, Section 22 of the California Constitution provides the State of California has the "exclusive right" to regulate intoxicating liquor, subject only to the laws of the United States. California Constitution, Art. XX, Sec. 22 (West's Supp., 1981). The designation statute delegates to the distillers the final authority over who shall be allowed to import distilled spirits, in violation of Art. XX, Sec. 22 of the California Constitution.

Other state grounds which respondents raised, but which were not dealt with by the court below include violations of the California Constitution's guarantees of due process and equal protection (California Constitution, Art. I, Sec. 7). If this Court should conclude that the designation statute is not preempted by federal legislation, the proper course would be to remand the case for consideration of the state grounds.

CONCLUSION

The court below found the designation statute invalid because it conflicts with and is preempted by the Sherman Act. That decision is correct and should be affirmed by this Court.

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Respectfully submitted,

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